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Forty-eighth session
Geneva, 6 May-26 July 1996

DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

Rapporteur: Mr. Igor Lukashuk

STATE RESPONSIBILITY

A. Introduction

1. At its first session, in 1949, the Commission selected State responsibility among the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility and appointed F.V. Garcia Amador as Special Rapporteur for the topic. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented six successive reports, dealing on the whole with the question of responsibility for injuries to the persons or property of aliens. 1/

1/ Yearbook ... 1969, vol. II, p. 229.

2. The Commission at its fourteenth session in 1962 set up a Sub-Committee whose task was to prepare a preliminary report containing suggestions concerning the scope and approach of the future study. 2/

3. At its fifteenth session in 1963, the Commission, after having unanimously approved the report of the Sub-Committee, appointed Mr. Roberto Ago as Special Rapporteur for the topic.

4. The Commission, from its twenty-first (1969) to its thirty-first sessions (1979) received eight reports from the Special Rapporteur. 3/

5. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft articles as follows: Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three, which the Commission might decide to include, could concern the question of the settlement of disputes and the implementation of international responsibility. 4/

6. The Commission at its thirty-second session, in 1980, provisionally adopted on first reading Part One of the draft articles, concerning "the origin of international responsibility". 5/

7. At its thirty-first session (1979), the Commission, in view of the election of Mr. Ago as a Judge to the International Court of Justice, appointed Mr. Willem Riphagen Special Rapporteur for the topic.

2/ Ibid., p. 229 et seq.

3/ For the eight reports of the Special Rapporteur see: Yearbook ... 1969, vol. II, doc. A/CN.4/217 and Add.1, pp. 125-156. Yearbook ... 1970, vol. II, doc. A/CN.4/233, pp. 177-198. Yearbook ... 1971, vol. II, (Part One), doc. A/CN.4/246 and Adds. 1-3, p. 199. Yearbook ... 1972, vol. II, doc. A/CN.4/264 and Add.1, p. 71. Yearbook ... 1976, vol. II, (Part One), doc. A/CN.4/291 and Add.1 and 2 pp. 3-55. Yearbook ... 1977, vol. II (Part One), doc. A/CN.4/302 and Add.1-3. Yearbook ... 1978, vol. II (Part One), doc. A/CN.4/318 and Add.1-4 and 1980, doc. A/CN.4/318/Add.5-7).

4/ Yearbook ... 1975, vol. II, pp. 55-59, doc. A/10010/Rev.1, paras. 38-51.

5/ Yearbook ... 1980, vol. II (Part Two), pp. 26-63, doc. A/35/10, chap. III.

8. The Commission, from its thirty-second (1980) to its thirty-eighth sessions (1986), received seven reports from Mr. Willem Riphagen, 6/ for Parts Two and Three of the topic. 7/

9. At its thirty-ninth session in 1987 the Commission appointed Mr. Gaetano Arangio-Ruiz as Special Rapporteur to succeed Mr. Willem Riphagen, whose term of office as a Member of the Commission expired on 31 December 1984. The Commission, from its fortieth (1988) to its forty-eighth (1996) sessions, received eight reports 8/ from Mr. Gaetano Arangio-Ruiz. 9/

6/ For the seven reports of the Special Rapporteur, see
Yearbook ... 1980, vol. II (Part One), p. 107, doc. A/CN.4/330;
Yearbook ... 1981, vol. II (Part One), p. 79, doc. A/CN.4/334;
Yearbook ... 1982, vol. II (Part One), p. 22, doc. A/CN.4/354;
Yearbook ... 1983, vol. II (Part One), p. 3, doc. A/CN.4/366; and Add.1;
Yearbook ... 1984; vol. II (Part One), p. 1, doc. A/CN.4/380;
Yearbook ... 1985, vol. II (Part One), p. 3, doc. A/CN.4/389; and
Yearbook ... 1986, vol. II (Part One), p. 1, doc. A/CN.4/397; and Add.1.

7/ At its thirty-fourth session (1983) the Commission referred draft articles 1 to 6 of Part Two to the Drafting Committee. At its thirty-seventh session (1985) the Commission decided to refer articles 7 to 16 of Part Two to the Drafting Committee. At its thirty-eighth session (1986) the Commission decided to refer draft articles 1 to 5 of Part Three and its annex to the Drafting Committee.

8/ For the eight reports of the Special Rapporteur, see
Yearbook ... 1986, vol. II (Part One), p. 6, doc. A/CN.4/416 and Add.1;
Yearbook ... 1990, vol. II (Part One), doc. A/CN.4/425 and Add.1;
Yearbook ... 1991, vol. II (Part One), doc. A/CN.4/440 and Add.1;
doc. A/CN.4/44 and Add.1-3; doc. A/CN.4/453 and Add.1 and Corr.1, 2, 3 and Add.2 and 3; doc. A/CN.4/461 and Add.1 and 2; doc. A/CN.4/469 and Corr.1 (English only) and Add.1 and 2 and A/CN.4/476 and Corr.1 (English only) and Add.1.

9/ At its forty-first session (1989) the Commission referred to the Drafting Committee draft articles 6 and 7 of Chapter Two (legal consequences deriving from an international delict) of Part Two of the draft articles. At its forty-second session (1990) the Commission referred draft articles 8, 9 and 10 of Part Two to the Drafting Committee. At its forty-fourth session (1992) the Commission referred to the Drafting Committee draft articles 11 to 14 and 5 bis for inclusion in Part Two of the draft articles. At its forty-fifth session (1993) the Commission referred to the Drafting Committee draft articles 1 to 6 of Part Three and Annex thereto. At its forty-seventh session (1995) the Commission referred to the Drafting Committee articles 15 to 20 of Part One dealing with the legal consequences of internationally wrongful acts characterized as crimes under article 19 of Part One of the draft articles and new draft article 7 on the settlement of disputes, to be included in Part Three of the draft.

10. At the conclusion of its forty-seventh session, the Commission had provisionally adopted for inclusion in Part Two, draft articles 1 to 5 10/ and articles 6 (Cessation of wrongful conduct), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction), 10 bis (Guarantees of non-repetition), 11/ 11 (Countermeasures) by an injured State), 13 (Proportionality) and 14 (Prohibited countermeasures). 12/ It had furthermore received from the Drafting Committee a text for article 12 (Conditions relating to resort to countermeasures), on which it deferred action. 13/ At its forty-seventh session the Commission had also provisionally adopted for inclusion in Part Three, article 1 (Negotiation), article 2 (Good offices and mediation), article 3 (Conciliation), article 4 (Task of the Conciliation Commission), article 5 (arbitration), article 6 (Terms of reference of the Arbitral Tribunal), article 7 (Validity of an arbitral award) and Annex, article 1 (The Conciliation Commission) and article 2 (The Arbitral Tribunal).

10/ For the text of articles 1 to 5 (para. 1), with commentaries, see Yearbook ... 1985, vol. II (Part Two), pp. 24 et seq.

11/ For the text of article 5, para. 2 and articles 6, 6 bis, 7, 8, 10 and 10 bis, with commentaries, see Official Records of the General Assembly, Forty-eighth Session, Supplement No. 10 (A/48/10), pp. 132 et seq.

12/ For the text of articles 11, 13 and 14, see ibid., Forty-ninth session, Supplement No. 10 (A/49/10), footnote 362. Article 11 was adopted by the Commission on the understanding that it might have to be reviewed in the light of the text that would eventually be adopted for article 12 (see ibid., para. 352).

13/ See ibid., para. 352.

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Rapporteur: Mr. Igor Ivanovich Lukashuk

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

CONTENTS

		Paragraphs	Page
A.	Introduction		
B.	Consideration of the topic at the present session . .		
	1. Establishment of the Working Group		
	2. Outcome of the work carried out by the Working Group on International liability for injurious consequences arising out of acts not prohibited by international law		

GE.96-63266 (E)

CHAPTER V

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

A. Introduction

1. The Commission, at its thirtieth session (1978), included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur. 1/

2. The Commission, from its thirty-second (1980) to its thirty-sixth session (1984), received and considered five reports from the Special Rapporteur. 2/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

3. The Commission, at its thirty-sixth session (1984), also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 3/ and a study prepared by the

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1/ At that session the Commission established a working group to consider, in a preliminary manner, the scope and nature of the topic. For the report of the Working Group, see Yearbook ... 1978, vol. II (Part Two), pp. 150-152.

2/ For the five reports of the Special Rapport, see Yearbook ... 1980, vol. II (Part One) p. 247, document A/CN.4/334 and Add.1 and 2; Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2; Yearbook....1982, vol. II (Part One), p. 51, document A/CN.4.360; Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373; Yearbook ... 1984, vol. II (Part One) p. 155, document A/CN.4/383 and Add.1.

3/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 4/

4. The Commission, at its thirty-seventh session (1985), appointed Mr. Julio Barboza, Special Rapporteur for the topic. The Commission received 12 reports from the Special Rapporteur from its thirty-seventh (1985) to its forty-eighth session (1996). 5/

5. At its fortieth session (1988), the Commission referred to the Drafting Committee draft articles 1 to 10 proposed by the Special Rapporteur for Chapter I (General Provisions) and Chapter II (Principles). 6/ The Commission deferred consideration of the tenth and eleventh reports of the Special Rapporteur and instead concentrated work on the articles of this topic already before the Drafting Committee which had before it the following draft

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4/ Yearbook ... 1985, vol. II (Part One) Addendum, document A/CN.4/384.

5/ For the 12 reports of the Special Rapporteur, see:

Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394;
Yearbook ... 1986, vol. II (Part One), p. 145, document A/CN.4/402;
Yearbook ... 1987, vol. II (Part One) p. 47, document A/CN.4/405;
Yearbook ... 1988, vol. II (Part One), p. 251, document A/CN.4/413;
Yearbook ... 1989, vol. II (Part One), p. 131, document A/CN.4/423;
Yearbook ... 1990, vol. II (Part One), p. 83, document A/CN.4/428;
Yearbook ... 1991, vol. II (Part One), p. 71, document A/CN.4/437;
Yearbook ... 1992, vol. II (Part One), p. 75, document A/CN.4/443;
Yearbook ... 1993, vol. II (Part One), document A/CN.4/450; document A/CN.4/459; document A/CN.4/468; and document A/CN.4/475 and Add.1.

6/ For the text, see Yearbook ... 1988, vol. II (Part Two), p. 9. At its forty-first session (1989), the Commission also referred to the Drafting Committee the revised version of those articles which had already been referred to the Drafting Committee at the previous session. See Yearbook ... 1989, vol. II (Part Two), para. 311. Further changes on some of those articles were again proposed by the Special Rapporteur in his Sixth Report, see Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10), para. 471.

articles: draft articles 1 to 10 for Chapter I (General provisions) and Chapter II (Principles); 7/ and a draft which numbered as article 10 (non-discrimination) to article 20 bis. 8/

6. At its forty-fourth session (1992), the Commission established a Working Group to consider some of the general issues relating to the scope, the approach to be taken and the possible direction of the future work on the topic. 9/ On the basis of the recommendation of the Working Group, the Commission at its 2282nd meeting on 8 July 1992 decided to continue the work on this topic in stages. First to complete work on prevention of transboundary harm and to proceed with remedial measures. 10/ The Commission decided that, in view of the ambiguity in the title of the topic, to continue with the working hypothesis that the topic deal with "activities" and to defer any formal change of the title.

7. At its forty-sixth (1994) and forty-seventh sessions (1995), the Commission provisionally adopted on first reading the following draft articles with commentaries thereto: 1 (scope of the present articles); 2 (use of terms); 11 (prior authorization); 12 (risk assessment); 13 (pre-existing activities); 14 (measures to prevent or minimize the risks); 14 bis [20 bis] (non-transference of risk); 15 (notification and information); 16 (exchange of information); 16 bis (information to the public); 17 (national security and industrial secrets); 18 (consultations on preventive measures); 19 (rights of the State likely to be affected); 20 (factors involved in an equitable balance

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7/ The articles are found in Yearbook ... 1988, vol. II (Part One) p. 251, document A/CN.4/413 and were referred to the Drafting Committee at the fortieth session in 1998.

8/ The articles are found in Yearbook ... 1993, vol. II (Part One), document A/CN.4/450 and referred to the Drafting Committee at the forty-fifth session in 1993.

9/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10) pp. 127-129.

10/ For a detailed recommendation of the Commission, see Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10) pp. 196-198.

of interests); article A [6] (freedom of action and the limits thereto); article B [8 and 9] (prevention); article C [9 and 10] (liability and reparation); and article D [7] (cooperation). 11/

B. Consideration of the topic at the present session

8. At the present session the Commission had before it the twelfth report of the Special Rapporteur 12/ which he introduced at the 2450th meeting on 28 June 1998. The report reviewed the various liability regimes proposed by the Special Rapporteur in his previous reports.

1. Establishment of the Working Group

9. The Commission at its 2450th meeting on 28 June 1996 decided to establish a Working Group in order to review the topic in all its aspects in the light of the reports of the Special Rapporteur and the discussions held, over the years, in the Commission and make recommendations to the Commission. 13/

2. Outcome of the work carried out by the Working Group on International liability for injurious consequences arising out of acts not prohibited by international law

10. The Working Group referred to in paragraph 9 above submitted a report which was introduced by its Chairman at the 2465th meeting of the Commission on 19 July 1996. The report of the Working Group is annexed to the present report.

11. The Commission considered that the report of the Working Group represented a substantial advance on the work on the topic. It presented a complete picture of the topic relating to the principle of prevention and that of liability for compensation or other relief, presenting articles and commentaries thereto. Though the Commission was not able to examine the draft articles at the current session, it felt that, in principle, the proposed draft articles provided a basis for examination by the General Assembly at its fifty-first session.

11/ Articles 1, 2, 11 to 20 were adopted in 1994 and articles A to D were adopted in 1995.

12/ Document A/CN.4/475.

13/ For the Composition of the Working Group see para. ... above.

12. The Commission would welcome comments by the General Assembly on the specific questions referred to in the commentary to article 1, the approach to the issue of compensation or other relief as set out in Chapter III, as well as on the draft articles as a whole. Comments which Governments may wish to make in writing would also be welcome. These comments are necessary to provide guidance for the subsequent work of the Commission on this topic.

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CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

B. Consideration of the topic at the present session

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CHAPTER VI

RESERVATIONS TO TREATIES

A. Introduction

1. The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its programme of work at its forty-sixth session (1994) the topic "The law and practice relating to reservations to treaties".

2. At its forty-sixth session, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic. 1/

3. At its forty-seventh session, the Commission received the first report of the Special Rapporteur on the topic. 2/ It considered the report at its 2400th to 2404th meetings, at its 2406th and 2407th meetings and at its 2412th and 2416th meetings.

4. The Special Rapporteur summarized as follows the conclusions he drew from the Commission's discussion of the topic under consideration:

(a) The Commission considered that the title of the topic should be amended to read: "Reservations to treaties";

(b) The Commission should adopt a guide to practice in respect of reservations. In accordance with the Commission's Statute and its usual practice, this guide would take the form of draft articles whose provisions would be guidelines for the practice of States and international organizations in respect of reservations; these provisions would, if necessary, be accompanied by model clauses;

(c) The above arrangements should be interpreted with flexibility and, if the Commission felt that it must depart from them substantially, it could submit new proposals to the General Assembly on the form that the results of the work might take;

(d) There was a consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.

5. These conclusions constituted, in the view of the Commission, the results of the preliminary study requested by the General Assembly in

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1/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 382.

2/ Document A/CN.4/470 and Corr.1.

resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994. In the Commission's opinion, the model clauses on reservations, to be inserted in multilateral treaties, should be designed to minimize disputes in the future.

6. Again, at its 2416th meeting, on 13 July 1995, the Commission, in accordance with its earlier practice, 3/ authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. This questionnaire would be sent to the addressees by the Secretariat.

B. Consideration of the topic at the present session

7. At the present session, the Commission had before it the Special Rapporteur's second report on the topic. 4/ The report was submitted to the Commission at its 2460th meeting, held on 16 July 1996.

(a) Presentation by the Special Rapporteur of his second report

The report consisted of two quite separate chapters:

Chapter I, "Overview of the study", was on the Commission's future work on the topic of reservations to treaties and proposed a provisional general outline of the study. Chapter II, "Unity or diversity of the legal regime of reservations to treaties" dealt, on the one hand, with the legal regime for reservations and substantive rules applicable to reservations in general, and on the other hand, with the application of this general regime to human rights treaties. A bibliography on reservations to treaties was annexed to the report.

8. In chapter I, the Special Rapporteur recalled the conclusions of his first report as well as the detailed questionnaire he had prepared on reservations to treaties, so as to inquire into the practice of, and problems encountered by, States. Fourteen States had so far answered the questionnaire. In chapter I, the Special Rapporteur indicated the area covered by the study. Five major problems of substance had predominated in the discussion that had followed the presentation of the first report:

3/ See Yearbook ... 1993, vol. II (Part Two), para. 286.

4/ A/CN.4/477 and A/CN.4/477/Add.1.

(i) The definition of reservations, the distinction between them and interpretative declarations and the differences of legal regime which characterize the two institutions;

(ii) The doctrinal quarrel (which has, however, important practical consequences) between the "permissibility" and "opposability" schools, which had a bearing, eventually, on what could probably be considered prima facie as the main problem raised by the subject: conditions for the permissibility and opposability of reservations;

(iii) The settlement of disputes;

(iv) The effects of the succession of States on reservations and objections to reservations;

(v) The question of the unity or diversity of the legal regime applicable to reservations based on the object of the treaty to which they are made.

9. Significantly, quite striking agreement was found, further to the discussion in the Sixth Committee, between the members of the Commission and the representatives of States in regard to the hierarchy of the problems posed - or left pending - by the present legal regime of reservations to treaties. The main topics that caused difficulty were the following:

(i) The question of the very definition of reservations;

(ii) The legal regime governing interpretative declarations;

(iii) Objections to reservations; and

(iv) The rules applicable, if need be, to reservations to certain categories of treaties and, in particular, to human rights treaties.

10. The Special Rapporteur recalled the form to be taken by further study of the topic, which should preserve the achievements of the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions and lead, if need be, to a "guide to practice in respect of reservations". Such a guide, if it was to be of any real value to States and international organizations, should be divided into chapters, in the following form:

(i) Review of the relevant provisions of the 1969, 1978 or 1986 Vienna Conventions;

(ii) Commentaries to those provisions, bringing out their meaning, scope and ambiguities or gaps;

(iii) Draft articles aimed at filling the gaps or clarifying the ambiguities,

- commentaries to the draft articles;

(iv) Model clauses which could be incorporated, as appropriate, in specific treaties and derogating from the draft articles;

- commentaries to the model clauses.

11. The provisional general outline envisaged by the Special Rapporteur would consist in principle of the following chapters:

I Unity or diversity of the legal regime of reservations to multilateral treaties (reservations to human rights treaties);

II Definition of reservations
(This chapter would also discuss the question of interpretative declarations and their legal regime);

III Formulation and withdrawal of reservations, acceptances and objections;

IV Effects of reservations, acceptances and objections;

V Fate of reservations, acceptances and objections in the case of succession of States; and

VI The settlement of disputes linked to the regime of reservations. 5/

12. The Special Rapporteur estimated, subject to unforeseen difficulties and in view of the purely provisional nature of the estimate, that the task could be concluded within four years, so that the first reading of the guide to practice in respect of reservations to treaties could be completed in 1999 with the consideration of chapters V and VI.

13. Chapter II of the report dealt, on the one hand, with the question of the unity or diversity of the legal regime of reservations to treaties and, on the other, with the specific question of reservations to human rights treaties. In this regard, the Special Rapporteur emphasized that this chapter, (item I of the general outline proposed in chapter I of his report) sought to determine whether the rules applicable in respect of reservations to treaties (whether codified by the 1969 or 1986 Conventions or customary in character) were applicable to all treaties, regardless of their object, and particularly to human rights treaties. He recalled that the question had been posed with

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5/ See document A/CN.4/477, para. 37.

some insistence both during the debate and during the discussion in the Sixth Committee of the General Assembly at its fiftieth session. The question corresponded to concerns raised by the practice and recent - and controversial - jurisprudence of human rights treaty monitoring bodies in regard to reservations. It therefore seemed necessary to him for the International Law Commission to state the view of general international law of which it was one of the organs. It was for that reason that the Special Rapporteur deemed it advisable to tackle the subject in his second report, for it seemed to him to be a matter of some urgency.

14. The first question concerned the unity or diversity of the legal regime(s) applicable to reservations and could be posed in these terms: do some treaties (for example, "normative" treaties) escape or should they escape the application of the Vienna regime because of their object? If so, to what particular regime(s) were those treaties subject or should they be subject in regard to reservations? This question of principle could be examined in three stages.

15. (a) First, the Special Rapporteur discussed the diversity of treaties and the legal regime of reservations. He held the view that it was prudent to confine the study only to normative treaties, setting aside other categories of treaty (limited treaties, constituent instruments of international organizations, bilateral treaties, etc.) either because they have already been the subject of separate treatment (particularly in the 1969 and 1986 Vienna Conventions) or because he intended to deal with them at a later stage in the study. On the other hand, "normative" treaties ("codification" or human rights conventions or conventions establishing rules of conduct for all States in legal, technical, social, humanitarian and other fields) posed special problems for the topic under consideration because, in the view of some, the general legal regime of reservations would not apply to them or quite simply because those instruments by their very nature would not lend themselves to the formulation of reservations, especially human rights treaties. He pointed out that this term often encompassed several classes of treaties of a very differing nature and did not constitute a homogeneous category. Furthermore, while they did have certain essential features conferred on them by their "normative" character, designed above all to institute common international

regulation on the basis of shared values, it was important not to take too simplistic a view: such treaties still contained typically contractual clauses.

16. In this context, the Special Rapporteur first considered the function of the legal regime of reservations. Two apparently contradictory interests were involved: on one side, the interest of broadening the convention, and on the other, the integral nature of the convention. The function of the rules applicable to reservations was to strike a balance between these conflicting requirements: the aim to secure broader participation and, at the same time, to preserve the ratio contrahendi, of what constituted the treaty's raison d'être.

17. The problem could also arise in terms of consent in the light of the consensus basis of the law of treaties: from that standpoint, a balance should be found between the freedom of consent of the reserving State and that of the other States parties. It was from the standpoint of these requirements that the Special Rapporteur wondered whether the legal regime of reservations set out in the 1969 and 1986 Vienna Conventions was generally applicable and, in particular, whether it was suited to the particular character of "normative" treaties (or rather, the "normative clauses" in general multilateral treaties).

18. In doing so, the Special Rapporteur discussed the background of the "Vienna regime" and its sources (travaux préparatoires, previous work of the International Law Commission, and so on) to show that the authors of the regime had been aware of these requirements and, in response, had sought to adopt generally applicable rules. Both the International Law Commission and the conferences on the codification of the law of treaties had tried to establish a single regime applicable to reservations to treaties, regardless of their nature or object.

19. (b) The Special Rapporteur then went on to consider the question of whether the "Vienna regime" was applicable more particularly to normative treaties and especially to human rights treaties. (This question was linked with the problem of the admissibility of reservations to such instruments, but it was a problem for which there was still no possible conclusion and one which depended on political or ideological considerations). There was no lack of arguments in favour of an affirmative answer (greater participation of States in such treaties, participation better than no participation) or a

negative answer (contradiction between "reservation" and human rights, particular nature of such treaties by virtue of their quasi-legislative function and the uniformity of application).

20. The Special Rapporteur none the less noted that the real legal question lay in the question of whether or not, when the contracting parties remained silent on the legal regime of reservations, the rules contained in the 1969 and 1986 Conventions were suited to any kind of treaty, including "normative" treaties, including human rights treaties.

21. In order to answer this question affirmatively, the Special Rapporteur noted that the rules applicable to this type of treaty under the Vienna Conventions struck a good balance between the concerns expressed both by the advocates of reservations and those expressed by their opponents. He also noted that the basic characteristics of the "Vienna regime", i.e. its flexibility and adaptability, had enabled it to meet the particular needs and special features of all types of treaties or treaty provisions and had led the International Law Commission, in 1963 and 1966, to rule out any exception in favour of normative treaties.

22. In its Advisory Opinion on "Reservations to the Convention on Genocide", the International Court of Justice had already drawn attention to the advantages of greater flexibility in the international practice concerning multilateral conventions, which it had applied to a human rights treaty par excellence. The Special Rapporteur identified three elements that enabled the "Vienna regime" to apply satisfactorily to all treaties, regardless of their object, including human rights treaties:

(a) The permissibility of reservations had to be evaluated in the light of the object and purpose of the treaty;

(b) The freedom of the other contracting parties to agree was fully preserved through the mechanism of acceptances and objections; and

(c) The right to "formulate" reservations was only of a residual nature, since each treaty could restrict such freedom and even prohibit any or certain reservations.

23. Consequently, the "Vienna regime" was suited to the particular features of normative treaties. The Special Rapporteur noted that problems related to the "integrity" of normative treaties, problems with regard to the

"non-reciprocity" of undertakings and problems of equality between the parties were not likely to prevent the "Vienna regime" from being applicable. It was clear that:

(a) The regime of reservations established by the 1969 and 1986 Conventions was conceived by its authors as being able to be, and being required to be, applied to all multilateral treaties, regardless of their object, with the exception of certain treaties concluded by a limited number of parties and the constituent instruments of international organizations, for which some limited exceptions were made;

(b) Because of its flexibility, the regime was suited to the particular characteristics of normative treaties, including human rights instruments;

(c) While not ensuring their absolute integrity, which was scarcely compatible with the actual definition of reservations, it preserved their essential content and would guarantee that it was not distorted;

(d) This conclusion was not contradicted by the arguments alleging the so-called violation of the principles of reciprocity and equality between the parties: if such a violation occurred it would be caused by the reservations themselves and not by the rules applicable to them; moreover, these objections were hardly compatible with the actual nature of normative treaties, which were not based on reciprocity of the undertakings given by the parties;

(e) There was no need to take a position on the advisability of authorizing reservations to normative provisions, including those relating to human rights: if it was considered that they must be prohibited, the parties were entirely free to exclude them or limit them as necessary by including an express clause to this effect in the treaty, a procedure which was perfectly compatible with the Vienna rules, which were only of a residual nature.

24. (c) In the third place, the Special Rapporteur considered the implementation of the general reservations regime and, in particular, the application of the Vienna regime to human rights treaties. In practice, the basic criterion of the object and purpose of the treaty was applied to reservations to such treaties (including those cases where there were no reservations clauses). This basic principle was embodied in the texts of several human rights treaties and the practice of States: the particular nature of normative treaties therefore had no effect on the reservations regime.

25. Referring to machinery for monitoring the implementation of the reservations regime, the Special Rapporteur noted that additional forms of control carried out directly by human rights treaty monitoring bodies had developed since the Vienna Conventions. There were thus two parallel types of monitoring of the permissibility of reservations in this regard: traditional mechanisms (monitoring by the contracting States and, as appropriate, by the courts in the dispute settlement context) and the human rights treaty monitoring bodies. The role of the latter in respect of reservations had acquired genuine significance in the past 15 years both at the regional level (practice of the Commissions of the European and Inter-American Courts of Human Rights) and at the international level (the Committee on the Elimination of Discrimination against Women and, in particular, the Human Rights Committee, 6/ etc.).

26. The basis for the control carried out by the monitoring bodies was linked to their mandate itself. Since these instruments established bodies to monitor their implementation, these bodies had the competence vested in them by their own powers, in accordance with a general principle of law that is well established and recognized in general international law. These bodies would be able to carry out their functions only if they could be sure of the exact extent of their competence vis-à-vis the States concerned and such competence depended on the scope and validity of the expression of consent to be bound. In practice, moreover, the monitoring bodies verified the permissibility of reservations on the basis of the criterion of the object and purpose of the treaty. The Special Rapporteur noted that, consequently and in view of this development, a combination of the various means of verifying the permissibility of reservations existed with regard to human rights treaties (traditional monitoring by the contracting States in parallel with the control exercised by a monitoring body, when that body had been established by the treaty, in addition to other bodies, such as international jurisdictional or arbitral bodies, in the dispute settlement context, and even national courts). This situation does not exclude - in fact, it implies - a degree of complementarity among the different control methods, as well as cooperation among the bodies responsible for control.

6/ See General Comment No. 24, CCPR/C/21/Rev.1/Add.6, 11 November 1994.

27. The Special Rapporteur looked into the consequences of the findings of monitoring bodies. According to some opinions based on the principle of the "severability" of the reservation (the possibility of severing it from the rest of the expression by a State of its consent to be bound), only an "impermissible" reservation should be regarded as null and void, whereas the State continued to be a party to the treaty. However, this approach was contrary to the consensual principle, the basis of any treaty undertaking.

28. The Special Rapporteur nevertheless considered that the legal force of the findings made by monitoring bodies in the exercise of their determination power could not exceed that resulting from the powers vested in them for the performance of their general monitoring role. Thus, even where a reservation was found to be impermissible, they could not take the place of the State in determining whether or not it had intended to be bound by the treaty despite the impermissibility of the reservation. It was always the responsibility of States and States alone to rectify any impermissibility after having examined the findings in good faith.

29. In no case could any organ for determining the permissibility of reservations take the place of the reserving State in determining the latter's intentions regarding the scope of the treaty obligations it was prepared to assume; the State itself was thus responsible for deciding how to put an end to the defect in the expression of its consent arising from the impermissibility of the reservation. That "remedy" might take the form of the withdrawal of the impermissible reservation, its amendment along lines compatible with the object and purpose of the treaty or the termination of the State's participation in the treaty.

30. By way of conclusion, the Special Rapporteur summarized the main findings contained in his report. He noted that reservations to treaties did not require a normative diversification; the existing regime was characterized by its flexibility and its adaptability and it achieved satisfactorily the necessary balance between the conflicting requirements of the integrity and the universality of the treaty. That objective of equilibrium was universal. Whatever its object, a treaty remained a treaty and expressed the will of the States (or international organizations) that were parties to it. The purpose of the reservations regime was to enable those wishes to be expressed in a balanced manner and it succeeded in doing so in a generally satisfactory way.

It would be unfortunate to call the regime into question by attaching undue importance to sectorial considerations that could perfectly well be accommodated within the existing regime.

31. According to the Special Rapporteur, this general conclusion must nevertheless be tempered by two considerations:

(a) First, it was undeniable, that the law had not been frozen in 1951 or 1969; issues which had not or had scarcely arisen at that time had since emerged and called for answers; the answers could be found in the spirit of the "Vienna rules", although they must be adapted and extended, as appropriate, whenever that was found to be necessary;

(b) Secondly, it should be borne in mind that the normal way of adapting the general rules of international law to particular needs and circumstances was to adopt appropriate rules by the conclusion of treaties - and that could be easily done in the area of reservations through the adoption of derogating reservations clauses, if the parties saw a need for them.

32. No determining factor seemed to require the adoption of a special reservations regime for normative treaties or even for human rights treaties. The special nature of these instruments had been fully taken into account by the Judges in 1951 and the "codifiers" of later years and had not seemed to them to justify an overall derogating regime.

33. There was reason to believe, however, that the drafters of the Vienna Conventions had never envisaged the role which the bodies for monitoring certain treaties might have to play in applying the reservations regime they had established, especially in the area of protection of human rights. But this role could easily be circumscribed by the application of general principles of international law and by taking account of both the functions of a reservations regime and the responsibilities assigned to those bodies.

34. The Special Rapporteur recalled that his report contained a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to clarifying the legal aspects of the matter.

35. Owing to the lack of time, the Commission was unable to consider the report and the draft resolution. It decided to defer the debate on the topic until next year. However, several members congratulated the Special Rapporteur on the excellent exhaustive, lucid and balanced report he had

prepared on an extremely complex and sensitive issue. Accordingly, they recalled that it would be advisable for the Commission to give detailed consideration to some questions raised by the report, possibly taking account of other types of normative treaties. The fact that the Special Rapporteur had annexed a bibliography to his report was also praised. Some members expressed regret that the Commission had not found time to take action on the report at its forty-eighth session.

36. Some members also said that they agreed in principle with the idea of adopting a resolution along the lines proposed by the Special Rapporteur. Other members did not object to it, but expressed doubts about the advisability of such a resolution.

37. The question of the establishment of a working group on that question was also raised.

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION

Rapporteur: Mr. Igor Lukashuk

CHAPTER VII

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

1. Having regard to paragraph 9 of General Assembly resolution 50/45 of 11 December 1995, 1/ the General Assembly had requested the Commission to consider the matter under item 7 of its agenda entitled "Programme, procedures and working methods of the Commission and its documentation" and be considered in the Planning Group of the Enlarged Bureau.

2. The Planning Group held six meetings: it had before it the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session, entitled "Other decisions and conclusions of the Commission". 2/ Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, addressed the Planning Group at its second meeting.

1/

2/ Document A/CN.4/472/Add.1, paras. 175-190.

3. The Planning Group established an informal working group 3/ which discussed all the issues involved. It prepared a draft on the subject which constituted the basis for the report of the Planning Group.

4. At its 2459th to 2461st meetings, the Commission considered and endorsed the Planning Group's report.

PART I

EXECUTIVE SUMMARY AND PRINCIPAL CONCLUSIONS

5. The General Assembly's request

In 1995, the General Assembly requested the Commission "to examine the procedure of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law and to include its views in its report to the General Assembly at its fifty-first session". It also sought comments from Governments on "the present state of the codification process within the United Nations system".

In response to the Assembly's request, Part II of this Report reviews the Commission's procedures and seeks to identify changes which might enhance its usefulness and efficiency. Some of these changes the Commission itself can make; others will require the cooperation of other bodies, especially the Sixth Committee.

This Executive Summary sets out the main conclusions and recommendations of the Report.

6. General conclusions and recommendations

Conclusions

To decide what methods will enhance the progressive development and codification of international law requires one to take a view of the present scope for progressive development and codification, after nearly 50 years of work by the Commission. On this question, the Planning Group reaches the following general conclusions. (Paragraph references are to Part II.)

(a) The distinction between codification and progressive development is difficult if not impossible to draw in practice; the Commission has proceeded on the basis of a composite idea of codification and progressive development. Distinctions drawn in its Statute between the two processes have proved unworkable and could be eliminated in any review of the Statute (paras. 14-17).

3/ It consisted of Mr. J. Crawford (Convenor), Mr. D. Bowett, Mr. K. Idris, Mr. A. Pellet and Mr. S. Rao.

(b) Despite the many changes in international law and organization since 1949, there is important continuing value in an orderly process of codification and progressive development (paras. 25-28).

(c) There are a number of ways in which the Commission's work methods may be made more responsive and efficient, and the relationship with the Sixth Committee structured and enhanced (paras. 29-34).

Recommendations

For the reasons given in Part II, the Planning Group makes the following specific recommendations.

(a) Work should continue, following the procedure established by the Commission in 1992, to identify possible topics of future work to be recommended to the General Assembly (paras. 22-23).

(b) In parallel, the General Assembly - and through it other bodies within the United Nations system - should be encouraged to submit to the Commission possible topics involving codification and progressive development of international law (paras. 23, 35-36).

(c) The Commission should extend its practice of identifying issues on which comment is specifically sought from the Sixth Committee, where possible in advance of the adoption of draft articles on the point (para. 39).

(d) Questionnaires sent to Governments should be "user-friendly"; in particular they should provide clear indications of what is requested and why (para. 39).

(e) The Commission's Report should be shorter, more thematic, and should make every attempt to highlight and explain key issues in order to assist in structuring debate on the Report in the Sixth Committee (para. 39).

(f) Special rapporteurs should be asked to specify the nature and scope of work planned for the next session (para. 47). Their reports should be available sufficiently in advance of the session at which they are to be considered (para. 48).

(g) Special rapporteurs should be asked to work with a consultative group of members; this system should also be extended to the second reading of State responsibility (paras. 49-53);

(h) Special rapporteurs should as far as possible produce draft commentaries or notes to accompany their draft articles, and should revise them in the light of changes made by the Drafting Committee, so that the commentaries are available at the time of the plenary debate (paras. 54-58).

(i) The system of plenary debates should be reformed, to provide more structure and to allow for an indicative summary of conclusions by the Chairman at the end of the debate, based if necessary on an indicative vote (paras. 59-68).

(j) The current system of different membership of the Drafting Committee for different topics should be maintained (para. 72).

(k) Working groups should be more extensively used, both in an effort to resolve particular disagreements and, in appropriate cases, as an expeditious way of dealing with whole topics; in the latter case the Working Group will normally act in place of the Drafting Committee (paras. 75-76).

(l) The Commission should set and report to the General Assembly on its targets at the beginning of, and should review its future work programme at the end of, each quinquennium (para. 79).

(m) The Commission should revert to the earlier practice of a session of 10 weeks, with the possibility of extension to 12 weeks as required, and especially during the last session of a quinquennium (para. 84).

(n) The experiment of a split session should be tried in 1998 (paras. 85-90).

(o) The contribution of the Secretariat to the Commission's work should be maintained and reinforced (paras. 91-92).

(p) The International Law Seminar should be retained (para. 93).

(q) Relations with other bodies such as the regional legal bodies should be more encouraged and developed (para. 97).

(r) The Commission should seek to develop links with other United Nations specialized bodies with law-making responsibilities in their field, and should in particular explore the possibility of exchange of information and even of joint work on selected topics (para. 98).

(s) Consideration should be given to the consolidation and updating of the Commission's Statute to coincide with the fiftieth anniversary of the Commission in 1999 (paras. 99-101).

PART II

1. Introduction

7. By resolution 50/45 of 11 December 1995, the General Assembly, *inter alia*:

"9. Request[ed] the International Law Commission:

(a) To examine the procedures of its work for the purpose of further enhancing its contribution to the progressive development and codification of international law and to include its views in its report to the General Assembly at its fifty-first session;

(b) To continue to pay special attention to indicating in its annual report for each topic, those specific issues, if any, on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work;

10. Request[ed] the Secretary-General to invite Governments to comment on the present state of the codification process within the United Nations system and to report thereon to the General Assembly at its fifty-first session ...".

8. The Commission has kept its work methods under rather continuous review over the years, and has introduced a number of changes. 4/ But as the above paragraphs suggest, and as the debate on the Commission's report in the Sixth Committee in 1995 indicated, 5/ there is a perceived need for a more comprehensive review of "the present state of the codification process within the United Nations system", and of the future role of the Commission within that process. In accordance with paragraph 9 of General Assembly resolution 50/45, the Commission is asked to examine its own procedures in that regard.

4/ For earlier discussions of work methods, see e.g. the debate recorded in *ILC Yearbook* 1958 vol. II at pp. 107-110, based on a report by Mr. Zourek (A/CN.4/108). During the current (1992-1996) quinquennium, the ILC has sought to streamline its annual report (*ILC Yearbook* 1992 vol. II p. 136), has revised the arrangements for the work of the drafting committee (*ILC Yearbook* 1992 vol. II pp. 135-136), has processed a major topic (the proposed international criminal court) within three sessions through the use of an ad hoc working group (for the final recommendation see A/48/10, pp. 42, 255-335), and has introduced a more orderly and comprehensive procedure for consideration of possible new topics.

5/ See *Topical Summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session* (A/CN.4/472/Add.1, 10 January 1996), pp. 45-49.

9. This Report has been produced by the Commission 6/ as part of the continuing consideration within the Commission of its work methods and procedures, and by way of response to the General Assembly's request in paragraph 9 of resolution 50/45. It seeks to identify any changes in the procedures of its work which might enhance the Commission's usefulness and efficiency. 7/ As will be seen, some of these changes are within the Commission's power to make; others will require the initiative or cooperation of other bodies, and especially the Sixth Committee itself.

10. Discussion of the Commission's procedures needs to take into account a number of reforms adopted by the Commission in recent years as well as limitations imposed on its work by external factors. Rather than give a general account here, aspects of the Commission's work methods will be referred to in this report when necessary under each heading.

2. The scope for continuing codification and progressive development

11. Underlying the Assembly's request in paragraph 9 of General Assembly resolution 50/45 is the aim of "enhancing [the Commission's] contribution to the progressive development and codification of international law". The question what procedures of work will best achieve that result requires one to take a view as to the present scope for progressive development and codification, after nearly 50 years of work by the Commission.

12. The Commission was established by General Assembly resolution 174 (II) of 21 November 1947, 8/ and held its first session, lasting nearly nine weeks, in 1949. There was a substantial body of opinion at the time in favour of a full-time Commission.

13. The object of the Commission is stated to be "the promotion of the progressive development of international law and its codification" (Statute, Art. 1 (1)); its focus is to be "primarily" public international law, although

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6/ An initial draft was produced by a small working group consisting of Mr. Crawford (Convenor), Mr. Bowett, Mr. Idris, Mr. Pellet and Mr. Rao, and was revised by that working group to reflect discussion in the Planning Group.

7/ A number of these changes have been introduced in practice in the current quinquennium (see *supra*, note 1).

8/ The Statute has been amended on six occasions, most recently by General Assembly resolution 36/39 of 18 November 1981, which enlarged the number of members from 18 to 34.

it is not precluded from entering the field of private international law (Statute, Art. 1 (2)). In recent years the Commission has not so entered, except incidentally and in the course of work on subjects of public international law; moreover having regard to the work of bodies such as UNCITRAL and the Hague Conference on Private International Law, it may seem unlikely that it will be called on to do so.

(a) The "distinction" between codification and progressive development

14. Article 1 of the Statute draws a distinction between "progressive development of international law" and "its codification". That distinction is further developed in Article 15, where the idea of progressive development is ("for convenience") associated with the preparation of draft conventions, while the idea of codification of international law is associated with "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". As is well known, however, the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in order to give more precise effect to a principle. 9/ Moreover it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons.

15. Thus the Commission has inevitably proceeded on the basis of a composite idea of "codification and progressive development". In other words, its work has involved the elaboration of multilateral texts on general subjects of concern to all or many States, such texts seeking both to reflect accepted principles of regulation, and to provide such detail, particularity and further development of the ideas as may be required.

(b) The selection of topics for the Commission's work

16. A further aspect of the distinction drawn in the Statute between codification and progressive development relates to the selection of topics

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9/ See e.g. H.W. Briggs, *The International Law Commission* (Ithaca: Cornell University Press, 1965) pp. 129-141; S. Rosenne, *Practice and Methods of the International Law Commission* (New York: Oceana, 1984) pp. 73-74; I. Sinclair, *The International Law Commission* (Cambridge: Grotius, 1987) pp. 46-47, 120-126; R. Ago, "*Nouvelles reflexions sur la codification du droit international*" (1988) 92 RGDIP 539. See also Y. Daudet, *Les conférences des Nations Unies pour la codification du droit international* (L.G.D.J., Paris, 1968).

for work by the Commission. The Statute implies that the initiative for considering proposals for progressive development will emanate from the General Assembly (Art. 16) or other bodies (Art. 17), whereas it is for the Commission itself to select topics for codification which it may recommend to the General Assembly (Art. 18 (1) (2)). 10/ Article 18 (1) provides that:

> "The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not."

17. In practice the procedure for considering most of the subjects which the Commission has taken up has been much the same, whether or not the aspect of progressive development or codification might have been thought to predominate. Since 1970, most of the suggestions for future work have emanated from the Commission, although it was the General Assembly which, for example, reactivated the Code of Crimes against the Peace and Security of Mankind in 1981, 11/ and which requested the Commission to study the feasibility of an International Criminal Court. 12/ It should be stressed that the Commission has always sought the endorsement of the Assembly before engaging in detailed work on any project.

18. The survey of "the whole field of international law" for which Article 18 (1) called was initially carried out on the basis of a Secretariat memorandum - in fact produced by Professor Hersch Lauterpacht, later a member of the Commission. 13/ That memorandum reviewed and the Commission considered 25 topics, of which the Commission drew up a "provisional list of 14 topics selected for codification". 14/ A number of these were chosen for initial work.

10/ On the other hand the General Assembly may request the Commission to work on any question of codification, and such requests are to have priority: Art. 18 (3).

11/ General Assembly resolution 36/106, 10 December 1981.

12/ General Assembly resolution 45/41, 28 November 1990, para. 3; General Assembly resolution 46/54, 9 December 1991.

13/ A/CN.4/1/Rev.1; reprinted in E. Lauterpacht (ed.), *The Collected Papers of Sir Hersch Lauterpacht* (Cambridge: Cambridge University Press, 1970) vol. I, p. 445.

14/ *ILC Yearbook* 1949 p. 281.

19. As at 1996, of the 14 topics which were initially and provisionally selected, 9 have been treated by the Commission, in whole or substantial part. 15/ Of the remaining five, one was taken up without success, was then set aside, but has recently been proposed by the Commission for renewed partial treatment under the heading of Diplomatic protection; 16/ one

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15/ These are as follows (with indications of the eventual outcome of the work):

(a) Succession of States and Governments (substantial areas of succession of States have been dealt with by the Commission, leading to the Vienna Conventions of 1978 and 1983; one area, succession with respect to nationality, is newly under consideration. It has never been actively proposed to study succession of Governments, no doubt because, in the light of the virtually uniform practice of continuity of State obligations despite changes of Government there is very little to say);

(b) Jurisdictional immunities of States and their property (Draft Articles produced in 1991 but consideration of them deferred by the General Assembly in 1994 for 3-4 years);

(c) Regime of the high seas (Geneva Convention on the High Seas, 1958) and Regime of territorial waters (Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958). In fact the Commission also developed draft articles on Fisheries and conservation of the living resources of the high seas and on the Continental Shelf (leading to the two further Geneva Conventions of 1958 on these subjects);

(d) Nationality, including statelessness (two draft conventions on the elimination/reduction of future Statelessness, leading to the adoption of the Convention on the Reduction of Statelessness, 1961);

(e) Law of treaties (Vienna Convention on the Law of Treaties, 1968; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986);

(f) Diplomatic intercourse and immunities (Vienna Convention on Diplomatic Relations, 1961);

(g) Consular intercourse and immunities (Vienna Convention on Consular Relations, 1963);

(h) Arbitral procedure (Model Rules on Arbitral Procedure, 1958).

16/ Viz., treatment of aliens. See the reports by H. Garcia Amador, *ILC Yearbook* 1958 vol. II, pp. 47-73; *ILC Yearbook* 1959 vol. II, pp. 1-37; *ILC Yearbook* 1960 vol. II, pp. 41-67, and *ILC Yearbook* 1961 vol. II, pp. 1-54.

(State responsibility) is still under consideration; 17/ and three have never been taken up. 18/

20. Additional topics were added to the work programme in a number of ways. Especially in the early years of the Commission, a number of matters were specially referred to it by the General Assembly. In total, 16 such requests or recommendations have been made by the General Assembly, but of these no fewer than 7 requests were made in the very early years of the Commission.

21. In 1971/72 the Commission undertook a further and rather thorough review of its work, based on a series of Secretariat papers. 19/ The conclusions reached were modest: work would continue on the main topics then under consideration, and at the request of the General Assembly the topic of non-navigational uses of international watercourses was added. 20/

22. In 1992 the Commission embarked upon a more rigorous procedure for the selection of topics. 21/ A Working Group provisionally identified 12 topics as possible subjects of later work, and individual members were

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17/ The Commission decided in 1963 to study the general or "secondary" rules of responsibility: *ILC Yearbook* 1963 vol. II, p. 224. Detailed work did not begin until 1969, and has continued, under successive Special Rapporteurs (Ago, Riphagen, Arangio-Ruiz), until the present session, when it is expected that the first reading of the complete draft articles will be completed.

18/ Viz., Recognition of States and Governments; Jurisdiction with regard to crimes committed outside national territory; Right of Asylum. As to the second of these, the related topic of civil jurisdiction over matters occurring beyond the forum State was not included on the 1949 list - indeed it was hardly recognizable in the longer list from which that list was drawn: see *ILC Yearbook* 1949 at p. 281.

19/ See *ILC Yearbook* 1969 vol. II, pp. 234-235; *ILC Yearbook* 1970 vol. II, pp. 247-269; *ILC Yearbook* 1971 vol. II (2), 1-99. For the Commission's discussion and conclusions see *ILC Yearbook* 1971 vol. II (1), pp. 350-1; *ILC Yearbook* 1972 vol. II, pp. 205-214; *ILC Yearbook* 1973 vol. II, pp. 225-231. An earlier review had been carried out in 1962: *ILC Yearbook* 1962 vol. II, pp. 84, 190, when the Commission had declined to add new topics to an already heavy load.

20/ See *ILC Yearbook* 1973 vol. II, pp. 230-231; General Assembly resolution 2780 (XXVI), 3 December 1971. The second reading of the Draft articles on Non-navigational Uses of International Watercourses was completed in 1994: see A/49/10 pp. 196-326.

21/ *ILC Yearbook* 1992 vol. II (2), p. 54.

asked to write a short synopsis outlining the nature of the topic, the subject-matter to be covered, and the extent to which the topic was already dealt with in treaties or private codification projects by bodies such as the International Law Association or the Institut de Droit International. These synopses were published, 22/ and it was on the basis of the synopses that the Commission recommended in 1993 - and the General Assembly agreed - that work should begin on Reservations to treaties and on Succession of States as regards the nationality of natural and legal persons. 23/

23. The Commission believes this method of selection to be an improvement. Undertaking any new topic involves a measure of uncertainty, and requires a degree of judgement; the uncertainty is reduced, and judgement is assisted, if the selection is made only after careful consideration on the basis of work which does not commit the Commission either to the topic, or to the selection of any particular manner of treatment of it. At the same time the General Assembly - and through it other bodies within the United Nations system - should be encouraged to submit to the Commission possible topics involving codification and progressive development of international law. The Commission's agenda should desirably include both topics referred to it and those generated by it, and approved by the General Assembly, through the procedure described above.

24. A Working Group on the long-term programme of work, set up by the Commission established a general scheme of topics of international law which included topics already taken up by the Commission, topics under consideration by the Commission and possible future topics. (See ...)

(c) Codification and progressive development after 50 years

25. It was generally accepted after 1945 that international law was in many respects uncertain and undeveloped, and in need both of codification and progressive development. The simple idea that it would be possible, or even desirable, to express the whole of international law in a single "code" was

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22/ A/CN.4/454.

23/ *ILC Yearbook* 1993 vol. II, pp. 243-248. In 1995, the topic of Diplomatic protection was selected for a feasibility study without prior elaboration through the preparation of a synopsis: A/50/10, p. 264. General Assembly resolution A/50/45 of 11 December 1995, para. 8 noted this "suggestion" and invited Governments to submit comments on it.

soon dismissed. 24/ Quite apart from other considerations, the drafting of such a code would have been a Napoleonic task. But the fruits of long-term codification and progressive development can be seen in such areas as, for example, the law of treaties, diplomatic and consular relations, and the law of the sea. 25/ The applicable international rules in each of these fields are contained in texts which constitute the basic starting point for any legal consideration which may arise. This marks a clear advance in inter-State relations. It shows the continued value of an orderly process of "codification and progressive development".

26. On the other hand there have been many changes in inter-State relations and international institutions in the past 50 years, which potentially affect the work which it may be useful for the Commission to undertake. Relevant changes include:

(i) the technical and administrative character of many new legal issues;

(ii) a tendency to treat certain legal questions on a regional basis (e.g. some environmental issues) or even on a bilateral basis (e.g. investment protection);

(iii) the proliferation of bodies with special law-making mandates (whether permanent bodies such as UNCITRAL or the Legal Sub-Committee of the Committee on Peaceful Uses of Outer Space or ad hoc bodies such as the Third United Nations Conference on the Law of the Sea) or with primary institutional competence in a given field (the Human Rights Commission, the Human Rights Committee, United Nations Environmental Programme, World Trade Organization, etc.);

(iv) the work of United Nations specialized agencies in general (International Maritime Organization, International Civil Aviation Organization, etc.).

27. These factors do not all work in the same direction. The scope for the Commission to work without duplicating the work of other bodies is reduced

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24/ See *ILC Yearbook* 1973 vol. II, pp. 227-228 (paras. 152-158).

25/ Although the governing instrument is now the United Nations Law of the Sea Convention of 1982, in key respects - especially concerning the territorial sea and the high seas - it incorporates the provisions of the 1958 Conventions.

with the proliferation of agencies with specific responsibility for particular fields of law or practice. On the other hand there is scope for collaboration with such agencies in developing areas of international law which are of general as well as specialized interest. The tendency to treat particular problems bilaterally may be a response to perceived deficiencies in the general law, deficiencies which ought none the less to be addressed. There is, overall, a risk of fragmentation in international law and practice, which the Commission, with its general mandate and vocation, can help to counteract.

28. Thus while it is true that many of the major topics traditionally identified as ripe for codification - e.g. the law of the sea, treaties, diplomatic and consular relations - have been completed, the idea that codification is no longer necessary is misplaced. Even in relation to areas now covered by treaty, practice may develop and raise new difficulties requiring further consideration - as for example with reservations to treaties. At the international level, "codification and progressive development" is a continuing process. Moreover the pace of development of international law is now rapid, and the fact is that private bodies which study current problems - such as the International Law Association and the Institut de Droit International - seem to have no difficulty in identifying areas of law requiring, if not codification, then clarification, development and articulation. What the private bodies lack is the ability which the Commission as a body within the United Nations system has to obtain information from and engage in dialogue with Governments. This it can do through the Sixth Committee, through requests to Governments for information and comment, and through the Commission's direct links with regional consultative committees. So long as the process of liaison and dialogue is effective, the need for a body like the Commission is likely to continue.

29. On the other hand difficulties have emerged with the Commission's work, even in relation to the *first* generation of projects. For various reasons, some major topics on the Commission's agenda have taken a very long time to complete. These reasons include the importance, size and difficulty of the subjects in question. But none the less this has had the effect of slowing the Commission's progress on other topics on its agenda, and of creating doubts as to the desirability of the Commission taking on new work while old work remained incomplete.

30. In the view of the Commission, a number of changes to the ILC's work methods are desirable to cope with the present situation. The remaining sections of this report are devoted to the question what changes should be made, under the following headings:

(i) the relations between the Commission and the General Assembly (Sixth Committee) (sect. III);

(ii) the role of the Special Rapporteur (sect. IV);

(iii) the relations between the Commission, its Drafting Committee and working groups (sect. V);

(iv) the length and structure of sessions (sect. VI);

(v) the Commission's relations with other bodies (sect. VII);

(vi) possible revision of the Statute (sect. VIII).

3. The relations between the Commission and the General Assembly (Sixth Committee)

31. This matter was specifically referred to by the Assembly in preambular paragraph 7 of General Assembly resolution 50/45, which referred to the need ...

> "to enhance further the interaction between the Sixth Committee as a body of government representatives and the International Law Commission as a body of independent legal experts, with a view to improving the dialogue between the two organs".

While succinctly restating the character of the two bodies, this paragraph clearly implies that the dialogue between them could be improved.

32. Under Article 3 of its Statute, members of the Commission are elected by the General Assembly, from candidates nominated by Governments of United Nations Member States. The electors are enjoined to "bear in mind that the persons to be elected to the Commission should individually possess the qualifications required, and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured" (Statute, Art. 8). The existence of regional groups for the purposes of election is expressly recognized in the Statute as a result of the 1981 amendment (Art. 9), and this assists in assuring the representativeness of the Commission as a whole. On the other hand there is a healthy tradition within the Commission, which fully complies with members'

independent status, that all members participate as individuals and that they are in no sense "representatives". 26/

33. As to individual qualifications, Article 2 (1) requires that members "shall be persons of recognized competence in international law". Members are eligible for re-election without restriction (Statute, Art. 10); there is no age limit. It may be noted that there has never been a woman member of the Commission.

34. Against this background, the Commission turns to the substantive issues involved in the "interaction between the Sixth Committee as a body of government representatives and the International Law Commission as a body of independent legal experts".

(a) Initiation of work on specified topics

35. One important way in which new tasks can be generated for the Commission is in response to requests from the General Assembly or other United Nations organs. This is expressly envisaged in Articles 16 and 18 (3) of the Statute, but in recent years these provisions have been little used; nor has the debate associated with the "Decade of International Law" seen the development of new ideas for inclusion in the Commission's agenda by the Sixth Committee. As the Commission demonstrated in its work on the subject of protection and inviolability of diplomatic agents and other persons entitled to special protection under international law, 27/ and more recently on the Draft Statute for an International Criminal Court, 28/ it is capable of responding promptly to such requests. Its response may involve the provision of commentary or advice, or (as in the two cases mentioned) the preparation of draft articles in a form appropriate for adoption at a diplomatic conference.

36. In the view of the Commission, the Commission's workload should desirably include both topics generated within the Commission and approved by the General Assembly, and topics generated elsewhere within the United Nations system and specifically referred to the Commission by the General Assembly

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26/ The Statute itself is silent on the subject.

27/ This request came from the Security Council via the General Assembly: see A/9407; General Assembly resolution 3166 (XXVIII), 14 December 1973; see also *ILC Yearbook* 1972, vol. II, p. 312.

28/ See General Assembly resolution 45/41, 28 November 1990, para. 3, and for the Draft Statute see *ILC Report 1994* (A/49/10), p. 43.

under the Statute. Such requests may avoid duplication and encourage coordination in the international law-making effort. Of course topics referred should be appropriate to the Commission as "a body of independent legal experts" in the field of general international law.

(b) Review and commentary on work in progress

37. Discussion and feedback on the Commission's work by States takes a variety of forms. Especially in the early stages of work on a topic, States are asked to provide information about their practice and legislation, and to respond to a questionnaire. Representatives of Member States within the Sixth Committee provide oral comments on the Commission's annual Report, and the discussion of the Report in the Sixth Committee is now helpfully subdivided so as to focus on the various components of the Report. In addition States are asked to provide formal written comments in response to particular requests made by the Commission in its Report, and on the draft articles as adopted on first reading on any topic.

38. There is, however, considerable variation in the extent to which Governments provide information and comment on the Commission's reports and drafts. Governments may be content to allow work on a topic to develop, or being generally able to accept the lines of work may feel no need to comment. Others may wish to change the direction of particular work and may therefore be more vocal. Many Governments, especially those of developing countries, have very limited resources to devote to the task. None the less the fact remains that in many cases requests by the Commission for comments, or even for information, go unanswered. 29/ Interaction between the Commission and Member Governments is vital to the Commission's role, and there is scope for improvement on both sides.

29/ The numbers of written responses by Government to ILC questionnaires on some recent topics have been as follows:

State responsibility:	15	(*ILC Yearbook* 1980, vol. II (1), p. 153;
		(*ILC Yearbook* 1981, vol. II (1), p. 71)
Watercourses:	21	(A/CN.4/447 and Add 1-3)
Draft Code of Crimes:	13	(*ILC Yearbook* 1985, vol. II (1), p. 84;
		(*ILC Yearbook* 1987, vol. II (1), p. 11;
		(*ILC Yearbook* 1990, vol. II (1), p. 23)
Immunity of States:	28	(*ILC Yearbook* 1988, vol. II (1), p. 45)
Diplomatic Bag:	30	(*ILC Yearbook* 1988, vol. II (1), p. 121;
		(*ILC Yearbook* 1989, vol. II (1), p. 75)
Treaty reservations:	13	(as at 5 June 1996).

39. For its part the Commission believes that it should strive to extend its practice of identifying issues on which comment is specifically sought, if possible in advance of the adoption of draft articles on the point. These issues should be of a more general, "strategic" character rather than relating to issues of drafting technique. The Commission should strive to ensure that the Report and any questionnaires sent to Governments are more "user-friendly" and that they provide clear indications of what is requested and why. In particular the Commission's Report should be shorter, more thematic, and should make every attempt to highlight and explain key issues. The role of the General Rapporteur in the preparation of the Report should be enhanced. 30/ The Commission should return to those issues in the new quinquennium.

(c) The Sixth Committee's role in dealing with final drafts of the Commission

40. The task of the Commission in relation to a given topic is completed when it presents a completed set of draft articles on that topic to the Sixth Committee. The purpose of the Commission is - it is believed - fully performed if the draft articles and accompanying commentary articulate the relevant principles in a manner generally suitable for adoption by States. On the other hand, whether a particular set of draft articles is acceptable or appropriate for adoption at a given time is essentially a matter of policy for the Sixth Committee and for member States.

41. The response to a set of draft articles or other work of the Commission can take a variety of forms. In transmitting its work the Commission will itself make an initial recommendation on the point, 31/ but the choice of means is a matter for the Sixth Committee. In the case of a text which is not recommended for adoption as a convention, a less extended procedure of noting or incorporation in a General Assembly resolution may be all that is required. In the case of draft articles which could form the basis for a convention, the Sixth Committee can merely note the outcome, can deal with it in a preliminary way through a working group or convene a preparatory conference for a similar purpose, can convene a diplomatic conference forthwith, or (as with the Draft Articles on Non-navigational Uses of International Watercourses, currently under consideration) can elect to deal with the draft articles itself.

30/ See A/CN.4/L.473, p. 7.

31/ Statute, Art. 23.

Article 23 (2) of the Statute also contemplates that the Assembly "may refer drafts back to the Commission for reconsideration or redrafting". This possibility might be more effectively used.

42. The Commission would simply note that if there are serious doubts about the acceptability of *any* text on a given subject, it would be helpful if these were made known authoritatively by the General Assembly and Member States at an earlier stage, rather than being postponed or the difficulties shelved until after the Commission has completed its work and presented it to the Sixth Committee.

4. The role of the Special Rapporteur

(a) Appointment

43. Central to the working of the Commission has been the role of the special rapporteur. In fact the Statute only expressly envisages such an appointment in the case of projects for progressive development (Art. 16 (a)). 32/ But from the very first, the practice of the Commission has been to appoint a special rapporteur very early in the consideration of a project, and to do so without regard to whether the project might be classified as one of codification or progressive development. 33/

44. In practice rapporteurships tend to be distributed amongst members from different regions. This system, provided that it is applied with some flexibility, has many advantages, in particular in that it helps to ensure that different approaches and different legal cultures are brought to bear in the formulation of reports and proposals.

45. It should be stressed that difficulties which have been experienced in the Commission's work have largely been due not to the appointment of a special rapporteur for a topic but to the fact that special rapporteurs have tended, or even been expected, to operate in isolation from the Commission, with little guidance during the preparation of reports on the direction of

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32/ Art. 16 of the Statute qualifies this requirement with the words "in general", but the Rapporteur is clearly considered as central to the process laid down (e.g. in subparas. (d), (f) and (i)).

33/ See e.g. *ILC Yearbook* 1949 at p. 281 (initial appointment of rapporteurs for the topics law of treaties, arbitral procedure and regime of the high seas): the Commission at the same time sought data from Governments under Art. 19 (2) of the Statute, which is formally applicable only to codification projects: ibid.

future work. It is to this essential point, as the Planning Group identifies it, that the following paragraphs are largely directed.

(b) Elaboration of reports

46. It is through the preparation of (usually annual) reports that special rapporteurs mark out and develop their topic, explain the state of the law and make proposals for draft articles. A number of issues arise with respect to the preparation of reports.

(i) Need for prior approval by the Commission of the nature and scope of work planned for the next session

47. Present practice in the Commission is not uniform. Some rapporteurs disclose in fair detail the kind of report they have in mind to present to the next session; others do not. On balance, and whilst conceding the need for rapporteurs to enjoy a certain independence, disclosure ought to be the rule. It is essential that future reports should meet the needs of the Commission as a whole. Disclosure gives the possibility of feedback, both on matters of general direction and on particular points of substance. By contrast a report which treats an issue which the Commission regards as peripheral, or which fails to treat an issue which the Commission regards as central, will mean in effect that a session has been wasted.

(ii) Availability of reports before the beginning of the session

48. Here again present practice is not uniform. Some reports are circulated in advance of the session, some are not. Delays in translation and circulation due to financial constraints on the United Nations or to its rules for documentation are, of course, beyond the control of a special rapporteur. 34/ But it is highly desirable that all reports should be available to Commission members some weeks before the commencement of the session, to enable study and reflection. This would be even more the case with a shorter session.

(c) Need for a Standing Consultative Group

49. Article 16 (d) of the Statute envisages that "where the General Assembly refers to the Commission a proposal for the progressive development of international law", the Commission may "appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies"

34/ It may be noted that the deadline for responses to questionnaires, available the previous September, is often set very late - e.g. in March or April of the following year, making it difficult for special rapporteurs to take the responses fully into account in their reports of that year.

to the questionnaire circulated to Governments. This may imply that, furnished with replies, the special rapporteur is thereafter to work independently. But in most cases the practice has been for the special rapporteur to work largely in isolation in preparing reports. In other words, in the period between sessions a special rapporteur has no formal contact with other members of the Commission.

50. Other bodies, such as the International Law Association and the Institut de Droit International, work differently. Various members are chosen to act as a consultative group so that, between sessions, the rapporteur may consult over the best and most acceptable approach to be taken, and over the essential elements to the next report. Through questionnaires, the circulation of reports or exceptionally the holding of interim meetings, the group's advice is available. Although the report remains that of the rapporteur, it is likely that the input obtained will ensure that it is acceptable to the membership of the committee and by extension to the membership of the body as a whole.

51. The Commission notes that this method has been fruitfully employed in relation to the recent topic of State succession with respect to nationality. It believes that the method should be generally adopted, especially so far as new projects are concerned, and especially in relation to the early work, including the strategic planning, on a subject. The consultative group should be appointed by the Commission itself, and should be broadly representative. 35/

52. No doubt care should be taken not to over-formalize matters, and it should be stressed that the Report will remain the responsibility of the special rapporteur, rather than of the group as a whole. It is not the function of the group to approve the special rapporteur's report, but to provide input on its general direction and on any particular issues the special rapporteur wishes to raise. Whether the group is appointed for the duration of the quinquennium, or for some shorter period, can be determined on a case-by-case basis, in consultation with the Special Rapporteur.

53. Although these changes can be implemented without any amendment to the Statute, the Planning Group also recommends that in any revision of the

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35/ It could also be adopted in the second reading of State responsibility, which it is very desirable should be completed within the forthcoming quinquennium.

Statute the principle of such a group should be recognized. Unlike the present Statute (see para. 43 above), this should be done without any distinction being drawn between codification and progressive development.

(d) Preparation of commentaries to draft articles

54. There is a distinction between a report which analyses the area of law and practice under study, and a focused commentary to draft articles. The preparation of the former is, of course, a key task of a special rapporteur, but so too is the latter. At present, it is not unusual for draft articles to be referred to the Drafting Committee without commentaries having been prepared contrary to the earlier practice of the Commission. Indeed, draft articles are sometimes presented for final consideration by the Commission without commentaries, and the commentaries are only adopted, with little time for consideration, in the last stages of a session.

55. It can be argued that, since the draft articles are likely to be changed substantially in the Drafting Committee, the provision of commentaries by a special rapporteur in advance is premature. On the other hand, the Drafting Committee is in a much better position if it has available to it at the same time both draft articles and commentaries (or at least an outline of what the commentaries will contain). The commentaries help to explain the purpose of the draft articles and to clarify their scope and effect. It often happens that disagreement over some aspect of a draft can be resolved by the provision of additional commentary, or by the transfer of some provision from text to commentary or vice versa. The provision of articles alone precludes such flexibility, and may give the inclusion of some element in the text more importance than it deserves. Simultaneous work on text and commentary can enhance the acceptability of both. It may help avoid the undesirable practice of inserting examples in the text of an article - as is presently the case with Draft Article 19 (3) of Part 1 of State Responsibility. It will also form a valuable part of the *travaux préparatoires* of any treaty provision which may be adopted on the basis of the proposed text.

56. It should be stressed that commentaries in their final form are intended primarily as explanations of the text as finally adopted. Although an account of the evolution of that text is appropriate, the main function of a commentary is to explain the text itself, with appropriate references to key decisions, doctrine and State practice, so that the reader can see the extent to which the Commission's text reflects, or as the case may be develops or

extends the law. Generally speaking it is not the function of such commentaries to reflect disagreements on the text as adopted on second reading; this can be done in plenary at the time of final adoption of the text and appropriately reflected in the Report. 36/

57. Given the pressure of work on it, the Drafting Committee cannot be expected itself to produce revised commentaries. But, as soon as the Drafting Committee has approved a particular article, the commentary to that article should be prepared, or as the case may be revised, by the special rapporteur, with the assistance of the Secretariat. It should then be circulated either to members of the Drafting Committee or (as appropriate) to the members of the consultative group for the topic, to enable them to comment individually on it. As the Statute makes clear, 37/ Draft Articles should not be considered finally adopted without the Commission having approved the commentaries before it.

(e) The Special Rapporteur's role within the Drafting Committee

58. In practice it is in the Drafting Committee that divergent views on a topic are most clearly expressed and have to be reconciled; it is, equally, here that the independent role of the special rapporteur has to be accommodated with the range of views within the Commission. The demands of particular topics, and the approach of particular special rapporteurs, will always produce some diversity of practice. But as a general rule the Planning Group suggests that the role of the special rapporteur should comprise the following elements:

(i) to produce clear and complete articles, as far as possible accompanied either by commentaries or by notes which could form the basis for commentaries;

36/ The position is rather different at first reading. Art. 20 (c) (ii) of the Statute (which, however, deals with codification as distinct from progressive development) provides that the commentaries on texts adopted at first reading should indicate "divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution". But the Statute contains no such indication with respect to final draft articles: see Art. 22.

37/ Art. 16 (i) of the Statute provides that "The Rapporteur and the members appointed for that purpose ... shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission". To similar effect, see Art. 22.

(ii) to explain, succinctly, the rationale behind the draft articles currently before the Drafting Committee, including any changes that may be indicated;

(iii) in the final analysis, to accept the view of the Drafting Committee as a whole, even if it is contrary to the views advanced by the special rapporteur, and as necessary to reflect the view of the Drafting Committee in revised articles and/or commentary. In performing this function, the special rapporteur should act as servant of the Commission rather than defender of any personal views *avant la lettre*.

59. Of course a special rapporteur who disagrees with the eventual views of the Drafting Committee has every right to explain the disagreement in plenary when the report of the Drafting Committee is presented. It is open to the plenary to prefer the views of the special rapporteur to those of the Drafting Committee in such a case. Having regard to the size of the Drafting Committee and to its role vis-à-vis the plenary, however, there are likely to be few such cases. Moreover it is better for major disagreements which cannot be resolved in the Drafting Committee to be reported at an earlier stage to the plenary, with the possibility of an indicative vote to settle the matter (see below, paras. 60-62).

5. The role and relationships of the plenary to the Drafting Committee and Working Groups

(a) General debates in plenary

60. The primary role of the general debate in plenary is to establish the broad approach of the Commission to a topic. This is essential if the Drafting Committee, or a working group, is to undertake its task with confidence. Such subsidiary organs need to be sure that they are working along lines broadly acceptable to the Commission as a whole.

61. Plenary debates at present do not serve this purpose very well, and there are two main reasons for this. The first is that the plenary debate tends to be too general, covering the whole of a perhaps lengthy report without distinction between various issues, and sometimes descending to particular textual points which would be better dealt with in the Drafting Committee.

62. A second factor is a tendency to make lengthy speeches, as if the Commission were a lecture audience, to be instructed rather than persuaded. Long speeches are not the ideal form of debate, which becomes diffuse and

ceases to serve its primary purpose of giving guidance to the Commission, its committees and special rapporteurs on directions to be taken.

63. In the early days of the Commission speeches were almost invariably short, and focused on particular issues which may have given rise to difficulty or disagreement. In the Commission's view this is much the better practice, and the Commission should take steps to reinstate it as the norm.

64. Possible remedies include the following:

(i) First, an attempt should be made to provide a structure for the debate so that the Commission moves from point to point, with observations being restricted to the point under discussion. 38/

(ii) Second, members should exercise restraint. The best way to achieve this, in the view of the Planning Group is by the proper structuring of debate. In addition an informal "code of conduct" might be adopted favouring shorter interventions: the Chairman could call attention to this from time to time, if required.

(iii) Third, at the conclusion of the debate the Chairman should attempt a summary of the Commission's broad conclusions on the point, at the same time noting any disagreement that may have been expressed. 39/ No doubt this may sometimes be a difficult task, but if carefully performed, and if generally accepted as accurate by members, it will substantially assist the Drafting Committee or working group in their subsequent consideration of the issues. In the consideration of final drafts of articles, the function should be performed by the Chairman of the Drafting Committee, in conjunction with the Special Rapporteur.

38/ This technique was usefully adopted in discussion of Mr. Thiam's Ninth Report on the Code of Crimes: *ILC Yearbook* 1991, vol. I, 2205th-2214th meetings.

39/ At present this task, if performed at all, is performed by the Special Rapporteur. It might be better performed by the Chairman, leaving the Special Rapporteur as the author of the report under discussion to provide clarifications, and counter-arguments in response to comments.

65. This leads to consideration of the method of voting. At present the Commission and its subsidiary bodies attempt to reach consensus, and there is no doubt that as a general rule this is right.

66. But there is a difference between the adoption of decisions which are effectively final and the type of conclusions we suggest the Chairman should express in concluding a plenary debate. These would be provisional and tentative; they would be for guidance only, as much would remain to be done before final decisions could be taken. On particular points which may be controversial, there is much to be said for the Chairman testing the acceptability of his conclusions by calling for an indicative vote. Even more so on points of detail, where it is better to resolve the issue, one way or another, and move on. Minority views can of course be reflected in the summary records and in the Commission's Report.

67. Analogous situations will arise in subsidiary bodies such as the Drafting Committee. As work progresses, "decisions" need to be taken which are far from final, and it is burdensome and time-consuming to demand a consensus on all such matters. Members not in a majority in relation to an indicative vote would remain free to maintain their views at a later stage. However if there is a major disagreement on a point of principle, it may be appropriate that this be referred to the plenary for decision by an indicative vote or other means.

68. When decisions ultimately come to be taken, again every effort should be made to reach a consensus, but if this is not possible in the time available, a vote may have to be taken, perhaps after a "cooling off period" to allow time for discussion and reflection. Such a vote may be a better indication of the opinion of the Commission than a "false consensus" adopted simply in order to save time.

69. One minor change which could usefully be introduced is to establish a convention that any congratulatory or honorific statements that may be called for should come from the Chairman alone, speaking on behalf of the whole Commission. The time of the Commission should be spent on the substance of its work.

(b) The Drafting Committee

70. In 1958, the Commission formally recognized that the Drafting Committee was "a committee to which could be referred not merely pure drafting points, but also points of substance which the full Commission had been unable to

resolve, or which seemed likely to give rise to unduly protracted discussion". 40/ The need for the Drafting Committee to fulfil that role was accentuated with the further increase in the Commission's membership in 1981, and there can be no doubt that such a role continues to be vital.

71. This is not to say that the Drafting Committee should be the *only* body to perform that role. It will often be appropriate for issues on which there is an identified disagreement of principle to be referred to a smaller working group for discussion. Even if the point cannot be resolved by that group, the main lines of disagreement can usually be articulated and presented to the plenary in a form which allows a decision to be made, or an indicative vote taken. But in many other cases, issues of a lesser character will arise, or unforeseen points of principle emerge in the course of drafting, and inevitably the Drafting Committee will have the task of seeking to resolve these.

72. Membership of the Drafting Committee is burdensome: it meets on most days, and sometimes both mornings and afternoons. For this reason the recent practice of having Drafting Committees of largely different composition for different topics is to be welcomed, since it shares the burden between more members. 41/

73. On any given topic the Drafting Committee will usually consist of 12-14 members (with other members sitting as observers, and only occasionally speaking). This has the advantage that a consensus in the Drafting Committee is likely to attract substantial support in plenary.

74. Long statements are rare (and are to be discouraged). There is often a genuine debate. Discussion is predominantly in English and French, coinciding with the working language of the text under discussion, but members are free to use other official languages. In general the Drafting Committee works well.

(c) Working Groups

75. Working groups have been established by the Commission or by the Planning Group for different purposes and with different mandates. For example, it is usual to establish a working group on a new topic prior to the appointment of

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40/ See *ILC Yearbook* 1958, vol. II, p. 108.

41/ The practice was introduced in 1992: see *ILC Yearbook* 1992, vol. II (2), p. 54.

a Special Rapporteur, to help define the scope and direction of work. Another kind of group has the function of addressing and if possible resolving particular deadlocks. 42/ In addition working groups have sometimes been formed to handle a topic as a whole, e.g. in case of urgency, and will usually be of substantial size. The difference between this kind of working group and the Drafting Committee lies in the fact that, whereas the Drafting Committee works on texts of articles (and ideally on commentaries) prepared by a special rapporteur, a working group will begin work at an earlier stage in the process, when ideas are still developing. 43/ It may well continue its work over several sessions, with substantial continuity of membership, whereas the composition of the Drafting Committee changes from year to year. Such a working group is thus more closely involved in the formulation of an approach, and in the formulation of drafts. A good example is the Working Group which elaborated the Statute for a Permanent International Criminal Court, which began by focusing on some basic propositions on which agreement could be reached, before even attempting to draft any articles. 44/ Its role could certainly not have been performed by the Drafting Committee.

76. In such a working group there may be no special rapporteur, or the special rapporteur may have a limited role. In most cases, if the working group has undertaken careful drafting, we see no advantage in having its work redone by the Drafting Committee before submission to plenary. This may duplicate work or even lead to mistakes if the members of the Drafting Committee have not been party to the detailed discussion which underlies a particular text. On occasions the Drafting Committee may have a role in engaging in a final review ("toilette") of a text - from the perspective of adequacy and consistency of language. But in such cases the procedure by way of a working group is an alternative, not a mere preliminary, to discussion in the Drafting Committee.

42/ See e.g. the working group established in 1995 on "Rights and Duties of States for the Protection of the Environment", A/50/10, pp. 264-265.

43/ In the case of the Working Group on the International Criminal Court, it divided itself into subgroups at one stage for the purpose of drafting.

44/ A/47/10, p. 137.

77. Whatever its mandate, a working group is always subordinate to the Plenary, the Planning Group or the other organ which establishes it. It is for the relevant organ to issue the necessary mandate, to lay down the parameters of any study, to review and if necessary modify proposals, and to make a decision on the product of the work.

6. Structure of Commission Meetings

78. In the light of this discussion, we turn to issues of the structure of Commission meetings, including the planning of work over a quinquennium, and the length and arrangement of sessions.

(a) Planning of work over a quinquennium

79. At the first session of the current quinquennium in 1992, the Commission set targets for the quinquennium, targets which it has met and in one respect exceeded. 45/ The Commission expects that a similar exercise will be carried out in 1997, the first year of the next quinquennium. It is also desirable that a review be carried out at the end of the quinquennium of the goals set, and of any preparations which should be made to enable the planning of the following quinquennium to be decided on expeditiously at the beginning of its first year.

(b) Length of sessions

80. The Statute does not specify the length of sessions, although it does say that they will normally be held in Geneva (Art. 12, as amended in 1955). In fact all sessions have been held in Geneva except the 1954 session which was held in Paris, and the 1965 session which was split between Geneva and Monaco. It was no doubt assumed that sessions would be held annually, and this has in fact been the case since 1949. The length of sessions was normally 10 weeks: 12 weeks became the norm following General Assembly resolution 3315 (XXIX) of 14 December 1974. Except for the 1965 session, sessions have always been held in a single continuous period.

45/ For the goals set in 1992 see A/CN.4/L.473, para. 15. Consistently with those goals the Commission finished the second reading of the watercourses topic in 1994, and of the Draft Code of Crimes in 1996. It completed the first reading of State responsibility in 1996. Through a working group it made progress on the topic of international liability for injurious consequences of acts not prohibited by international law (specifically in relation to prevention), and began work on two new topics. An additional achievement was the commencement and completion of the Draft Statute for an International Criminal Court, which was not envisaged in the 1992 report.

81. In 1986 the normal 12 week session was reduced to 10 weeks for budgetary reasons, but in response to a strongly expressed view of the Commission, the 12 week session was restored in the following year and has been maintained since. The General Assembly has reaffirmed the need for the Commission to sit for the usual period of 12 weeks. 46/ The Commission now has almost twice as many members as it did originally. Its proceedings are inevitably lengthier, and this factor must be borne in mind when comparisons are made.

82. In principle, the Commission should be able to make a judgement on a year-to-year basis as to the likely required length of the following session (i.e. 12 weeks or less), having regard to the state of work and to any priorities laid down by the Assembly for the completion of particular topics.

83. In some years, a session of less than 12 weeks will be sufficient. In others, especially the last year in a quinquennium, nothing less that 12 weeks will suffice to enable complete texts to be finished on first or second reading with the same membership. For various reasons the Planning Group believes that in 1997 a 10 week session will be sufficient to cope with work in hand.

84. In the longer term, the length of sessions is related to the question of their organization, and in particular to the possibility of split sessions, to be discussed in the following section. Especially if a split session is adopted, the Planning Group believes that the Commission's work can usually be effectively done in a period of less than 12 weeks a year. It sees good reason for reverting to the older practice of a total annual provision of 10 weeks, with the possibility of extension to 12 weeks in particular years as required - and especially in the last year in a quinquennium.

(c) Possibility of a split session

85. Article 12 of the Statute (as amended in 1955) provides that the Commission is to sit at the United Nations Office in Geneva, although "after consultation with the Secretary-General" the Commission has "the right to hold meetings at other places". There is thus no statutory restriction on the Commission splitting its annual session into two parts, and for that matter

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46/ See e.g. General Assembly resolutions 41/81, 3 December 1986; 42/156, 7 December 1987, and most recently General Assembly resolution 50/638 of 11 December 1995, para. 11.

sitting for one part of the session at United Nations Headquarters in New York. In 1991/92 a procedure of split sessions was suggested but set aside for the time being. 47/

86. Those in favour of a single session argue that it is only through a continuous process of work that the necessary careful consideration can be given to proposed draft articles, both in plenary and in the Drafting Committee. At any one session the Commission is usually working actively on four or five topics, of which two may have priority. In the context of a split shorter session, consideration of topics not given priority at that session may well be perfunctory, leading to episodic progress on those topics and a lack of guidance to the special rapporteur. It should be stressed that the task of reaching a genuine consensus on draft articles may be difficult and inevitably takes time. The Commission does not merely endorse proposals of special rapporteurs but has to give them careful and critical consideration. With 34 members, coming from different legal, cultural and linguistic backgrounds this process cannot be rushed. Moreover there is a problem of "critical mass": it is only by careful collective consideration in plenary, in the Drafting Committee and in working groups that really satisfactory conclusions can be worked out, and the splitting of the session would tend to interrupt and fragment this process. In the view of these members a continuous session is necessary to assure the best results on priority topics while maintaining progress and direction on other topics.

87. On the other hand, those in favour of a split session argue that it would facilitate reflection and study by members of the Commission, and in particular that it would allow inter-sessional preparation to be carried out in a way that would make the second part of a split session much more productive. For example reports or proposals debated in plenary at the first part of the session could be dealt with by the Drafting Committee at the second part. Conversely, the Drafting Committee having completed consideration of particular articles in the first part, the amended articles and accompanying commentary could be got ready for the plenary in the second half, and members will have had the opportunity to read and consider them in advance. A split session would also encourage inter-sessional work of an informal kind, and give time to special rapporteurs to reconsider proposals

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47/ *ILC Yearbook* 1992, vol. II (2), p. 55.

discussed at the first part of a session. It would allow the Drafting Committee or a working group to occupy, for example, a week at the end of the first part of a session or at the beginning of the second half, without requiring members of the Commission who are not members of that committee or group to attend. It opens the prospect of membership to those who for professional or other reasons simply cannot make the commitment to a continuous period of 12 weeks in Geneva. It is more likely that members of the Commission with other commitments (whether as government legal advisers, private sector lawyers or university law professors) may be able to spend a continuous period of 4-5 weeks in session than that they can do so for 12 weeks. Currently, some members of the Commission find it necessary to be away from Geneva for considerable periods. Although conflicting commitments can never be excluded, two shorter sessions are likely to facilitate better and more continuous attendance. In short it will be more flexible.

88. The choice is affected by financial considerations which are beyond the Commission's control. Tentative calculations suggest that a 10 week session, split evenly between New York and Geneva, would be significantly cheaper than a continuous 12 week session. Even for a session of the same total length, it seems that a split session may not be significantly more expensive, because additional travel costs for members will be largely offset by the reduced cost of sending New York-based Secretariat personnel to Geneva.

89. In the view of the Planning Group, the experiment of a split session should be tried. For various reasons, including budgetary limits and the fact that 1997 is the first year of a quinquennium, however, it seems best to undertake the experiment in 1998. This will enable the proper planning of a split session - the advantages and disadvantages of which may be assessed in practice.

90. The planning of the distribution of work between the two parts of a split session is essential. Planning will necessarily be done on a year-to-year basis, and some flexibility will be necessary. But it may involve, for example, consideration in the first part of the session of reports of special rapporteurs and of draft articles by the Drafting Committee, and in the second part of the session of consideration in plenary of reports of the Drafting Committee, other groups and the Commission's report itself. It will be

necessary for the second part of the session to end not later than the end of July in order to allow the Commission's Report to the General Assembly to be produced by early September.

(d) The essential contribution of the Secretariat

91. Article 14 of the Commission's Statute provides simply that the Secretary-General shall "so far as he is able, make available staff and facilities required by the Commission to fulfil its task".

92. In practice the contribution of the Secretariat is essential. In addition to servicing the Commission and its subsidiary bodies, considerable research is undertaken by the Secretariat, often at short notice. Members of the Secretariat assist the officers of the Commission, providing the agenda, keeping records, preparing drafts of reports to plenary, etc. They assist in the preparation of the commentary to draft articles, although the Planning Group remains of the view that this is the primary responsibility of the special rapporteur. In working groups, where there may be no special rapporteur, this assistance is invaluable. The members of the Secretariat should be encouraged to make an even greater contribution to the Commission's work.

(e) The International Law Seminar

93. The Seminar has been a characteristic part of Commission sessions for many years, and many hundreds of younger professionals have been introduced to the United Nations and to the ILC's work through the seminar. It is hoped that it can be continued despite current financial constraints.

(f) Publishing the work of the Commission

94. The Commission's annual report to the Sixth Committee is produced within weeks of the end of the session, and subsequently reprinted in the Yearbook, which is the essential record of the Commission's work. The Yearbook contains summary records of plenary debates, the full texts of draft articles and commentaries as finally adopted, reports of Special Rapporteurs and other selected documents. Some progress has been made in catching up on the backlog with the Yearbook. In addition the United Nations publishes periodically a most useful survey entitled The Work of the International Law Commission. This summarizes the Commission's work and reprints draft articles adopted by it or, as the case may be, conventions or other texts concluded on the basis of such draft articles. The fifth edition appeared in 1996.

95. Unofficial accounts of the Commission's work appear in the international law literature. There is for example an annual review of the Commission's work published in the American Journal of International Law and the Annuaire Français de Droit international. Similar essays in the other languages of the Commission are to be encouraged.

7. The ILC's Relationship with Other Bodies (within and outside the United Nations)

96. The Commission's single most important relationship is its reporting relationship to the General Assembly through the Sixth Committee. But the Commission's Statute envisages that it may have a range of relationships with other bodies:

(a) Under Articles 16 (c), 17 (2) (b) and 21 (2), the Commission must circulate questionnaires to or seek comments from the Governments of Member States on any project it is considering.

(b) Under Article 17, the Commission may consider "proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification, and transmitted to it for that purpose by the Secretary-General".

(c) Under Chapter III of its Statute the Commission has a quite general power to consult with United Nations organs on any subject within their competence, and with any other organizations, intergovernmental or otherwise, national or international, on any subject entrusted to it (see Arts. 25 (1), 26 (1)).

(d) In a number of cases the Commission has consulted with particular agencies in a systematic way (e.g. with FAO, on the issue of fisheries beyond territorial waters). It has also sought advice from experts (e.g. on issues of maritime delimitation and drawing of baselines).

97. It is the practice of the Commission to hear reports from delegates from the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Inter-American Juridical Committee during each session. These are useful, but they tend to be rather formal, complementary exchanges. The Planning Group welcomes these exchanges but believes that they could be enhanced if a short written report of the work of the organization, with relevant documents, could be circulated in advance. A brief formal

exchange of views for the record could be supplemented by a less formal discussion involving members of the Commission and dealing with selected issues of interest to both bodies. Increased cooperation between these bodies and the Commission's special rapporteurs, as relevant, should also be encouraged, as well as cooperation between the ILC secretariat and the secretariats of these bodies, and exchanges of documentation.

98. A potentially important set of relationships is currently rather neglected. We refer to the work of United Nations and other specialized bodies with legal implications or responsibilities. At least it is appropriate for bodies with specific responsibilities in a given field to be asked to exchange information and to comment on the Commission's work where relevant - but at present the various component parts of the United Nations system operate largely in isolation from each other. Another possibility might be, in effect, a joint study of a particular legal topic conducted by the Commission with the agency responsible in the given field. National law commissions have conducted such joint studies in technical fields such as customs law and insolvency. There is no a priori reason to exclude the possibility at the international level.

8. Possible revision of the Statute

99. The Commission's Statute was drafted shortly after the end of the Second World War, and although it has been amended on a number of occasions it has never been the subject of a thorough review and revision. On the whole, the Statute has been flexible enough to allow modifications in practice. For example, the Statute makes more or less adequate provision for such matters as approval of a plan of work for a topic, 48/ and the appointment of a group of members to work with the special rapporteur. 49/ With respect to other matters discussed here (e.g. split sessions), it does not preclude appropriate changes being made. Most of the changes discussed in this Report can be implemented without any amendment to the Statute.

48/ ILC Statute, Art. 16 (b), Art. 17 (2) (a), 19 (1).

49/ ILC Statute, Art. 16 (2) (d) (although this provision only relates to the period after the questionnaire has been circulated to Governments, and only "pending receipt of replies to this questionnaire"): this provision could be redrafted in more general form, and made applicable to the whole process of consideration of a topic, whether or not involving the appointment of a special rapporteur.

100. Nevertheless there are aspects of the Statute which warrant review and revision as the Commission approaches its fiftieth year. Some few provisions of the Statute are anachronistic, and could be removed: for example, Article 26 (3), which refers to "relations with Franco Spain" and to "organizations which have collaborated with the Nazis and Fascists". The mention in Article 26 (4) of intergovernmental organizations whose task is the codification of international law could be broadened beyond the Pan-American Union to include, for example, the Asian-African Legal Consultative Committee, the Hague Conference on Private International Law, and UNIDROIT.

101. At a more substantive level the distinction drawn in Articles 1, 15 and elsewhere between codification and progressive development of international law has proved to be unworkable, and the procedure for both should be expressly assimilated. In particular the freedom expressly recognized to the Commission in respect of "codification" to "adopt a plan of work appropriate to each case" (Statute, Art. 19 (1)) should be formally extended to all the Commission's work. A number of other substantive issues will need to be considered.

102. The Planning Group recommends that the Commission [may] at its next session give thought to the possibility of recommending to the General Assembly a review of the Statute to coincide with the fiftieth anniversary of the Commission in 1999.

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DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Titles and texts of articles on the Draft Code of Crimes against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session (1996)

PART I. GENERAL PROVISIONS

Article 1

Scope and application of the present Code

1. The present Code applies to the crimes against the peace and security of mankind set out in Part II.

2. Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law.

Article 2

Individual responsibility

1. A crime against the peace and security of mankind entails individual responsibility.

2. An individual shall be responsible for the crime of aggression in accordance with article 16.

3. An individual shall be responsible for a crime set out in articles 17, 18, 19 or 20 if that individual:

(a) intentionally commits such a crime;

(b) orders the commission of such a crime which in fact occurs or is attempted;

(c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;

(d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;

(e) directly participates in planning or conspiring to commit such a crime which in fact occurs;

(f) directly and publicly incites another individual to commit such a crime which in fact occurs;

(g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

Article 3

Punishment

An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.

Article 4

Responsibility of States

The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

Article 5

Order of a Government or a superior

The fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires.

Article 6

Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

Article 7

Official position and responsibility

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

Article 8

Establishment of jurisdiction

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20, irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 15 shall rest with an international criminal court. However, a State Party is not precluded from trying its nationals for the crime set out in article 16.

Article 9

Obligation to extradite or prosecute

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual.

Article 10

Extradition of alleged offenders

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.

4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

Article 11

Judicial guarantees

1. An individual charged with a crime against the peace and security of mankind shall be presumed innocent until proved guilty and shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts and shall have the rights:

(a) in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law;

(b) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) to be tried without undue delay;

(e) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him if he does not have sufficient means to pay for it;

(f) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) not to be compelled to testify against himself or to confess guilt.

2. An individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law.

Article 12

Non bis in idem

1. No one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court.

2. An individual may not be tried again for a crime of which he has been finally convicted or acquitted by a national court except in the following cases:

(a) by an international criminal court, if:

(i) the act which was the subject of the judgment in the national court was characterized by that court as an ordinary crime and not as a crime against the peace and security of mankind; or

(ii) the national court proceedings were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted;

(b) by a national court of another State, if:

(i) the act which was the subject of the previous judgment took place in the territory of that State; or

(ii) that State was the main victim of the crime.

3. In the case of a subsequent conviction under the present Code, the court, in passing sentence, shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 13

Non-retroactivity

1. No one shall be convicted under the present Code for acts committed before its entry into force.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

Article 14

Defences

The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.

Article 15

Extenuating circumstances

In passing sentence, the court shall, where appropriate, take into account extenuating circumstances in accordance with the general principles of law.

PART II. CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 16

Crime of aggression

An individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression.

Article 17

Crime of Genocide

A crime of genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.

Article 18

Crimes against humanity

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group:

(a) murder;

(b) extermination;

(c) torture;

(d) enslavement;

(e) persecution on political, racial, religious or ethnic grounds;

(f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;

(g) arbitrary deportation or forcible transfer of population;

(h) forced disappearance of persons;

(i) rape, enforced prostitution and other forms of sexual abuse;

(j) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

Article 19

Crimes against United Nations and associated personnel

1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:

(a) murder, kidnapping or other attack upon any such personnel;

(b) violent attack upon the official premises, the private accommodation or the means of transportation of any such personnel likely to endanger his or her person or liberty.

2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

Article 20

War crimes

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale:

(a) any of the following acts committed in violation of international humanitarian law:

(i) wilful killing;

(ii) torture or inhuman treatment, including biological experiments;

(iii) wilfully causing great suffering or serious injury to body or health;

(iv) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) unlawful deportation or transfer or unlawful confinement of protected persons;

(viii) taking of hostages;

(b) any of the following acts committed wilfully in violation of international humanitarian law and causing death or serious injury to body or health:

(i) making the civilian population or individual civilians the object of attack;

(ii) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iii) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;

(iv) making a person the object of attack in the knowledge that he is hors de combat;

(v) the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other recognized protective signs;

(c) any of the following acts committed wilfully in violation of international humanitarian law:

(i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies;

(ii) unjustifiable delay in the repatriation of prisoners of war or civilians;

(d) outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(e) any of the following acts committed in violation of the laws or customs of war:

(i) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(ii) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(iii) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings or of demilitarized zones;

(iv) seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(v) plunder of public or private property;

(f) any of the following acts committed in violation of international humanitarian law applicable in armed conflict not of an international character:

(i) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(ii) collective punishments;

(iii) taking of hostages;

(iv) acts of terrorism;

(v) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(vi) pillage;

(vii) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable;

(g) in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.